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No. 92-1074

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED

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OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK,
as Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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May 20, 1993

53 pp

Question Presented

Whether the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, apply to any of an insurance company's General Account assets under a group annuity contract that provides for guaranteed benefits.

Parties

The parties to the action below were petitioner John Hancock Mutual Life Insurance Company ("Hancock"); respondent Harris Trust and Savings Bank ("Harris Trust"); counterclaim defendant Chase Manhattan Bank, N.A. ("Chase"), which was succeeded as trustee of the Sperry Master Retirement Trust No. 2 on October 1, 1987, by Harris Trust; and third-party defendants Sperry Corporation ("Sperry") and The Retirement Committee of Sperry Corporation ("Sperry Retirement Committee").

Hancock is a mutual insurance company; it does not have any parent companies or subsidiaries to list pursuant to Rule 29.1.

In 1986, Sperry merged with Burroughs Corporation and became Unisys Corporation ("Unisys"). The Sperry Retirement Committee was succeeded by the Unisys Pension Investment Review Committee. Shares of Unisys and shares of Chase are publicly traded. Petitioner is informed and believes that Harris Trust is acting as a party only in its capacity as trustee of the Sperry Master Retirement Trust No. 2 and is not otherwise affected by the outcome of this litigation, and that the Bank of Montreal is a parent of Harris Trust.

Hancock is not aware of any other parent companies or subsidiaries to list pursuant to Rule 29.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes (cont'd)

Statutes (cont'd)

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BRIEF FOR PETITIONER

Petitioner John Hancock Mutual Life Insurance Company ("Hancock") respectfully submits this brief in support of reversal of so much of the judgment of the United States Court of Appeals for the Second Circuit as (a) determined that the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*. ("ERISA"), apply to certain of Hancock's General Account assets in connection with a group annuity contract issued to respondent Harris Trust and Savings Bank ("Harris Trust") known as "GAC 50" (JA-109[1])

[1] References to pages of the Joint Appendix, the Appendix included in the Petition for a Writ of Certiorari, and the Appendix to this brief are cited as "JA-", "PA-", and "A-", respectively, followed by the page number.

and (b) reversed the judgment of the United States District Court for the Southern District of New York dismissing the action.

Opinions Below

The opinion of the court of appeals is reported at 970 F.2d 1138 (PA-1). The two opinions of the district court are reported at 722 F. Supp. 998 ("*Harris I*") (PA-21), and 767 F. Supp. 1269 ("*Harris II*") (PA-63); the judgment of the district court was entered on August 16, 1991 (PA-89).

Jurisdiction

The judgment of the court of appeals was entered on July 30, 1992 (PA-19). The court of appeals denied Hancock's petition for rehearing and suggestion for rehearing *in banc* on September 23, 1992 (PA-91). The petition for a writ of certiorari was filed on December 22, 1992, and was granted on March 22, 1993.[2] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988 & Supp. 1991).[3]

Statutes and Regulations Involved

The pertinent statutory provisions and regulations are set forth in the Appendix to the Petition beginning at PA-93.

[2] On January 21, 1993, Harris Trust filed a cross-petition for a writ of certiorari (No. 92-1259). The questions presented by Harris Trust in No. 92-1259 were (i) whether an insurance company should be deemed a fiduciary under ERISA by reason of its exercise of its contract rights under a group annuity contract with a pension plan, and (ii) whether all the assets held by an insurance company in its General Account under a typical group annuity contract like GAC 50, not just the portion of such assets that are "not referable to guaranteed benefits," are subject to ERISA's fiduciary rules. By order entered on March 22, 1993, the Court denied Harris Trust's cross-petition.

[3] The amended complaint alleged jurisdiction in the district court based upon 28 U.S.C. §§ 1331 and 1332 (1988 & Supp. 1991), and ERISA § 502, 29 U.S.C. § 1132 (1988 & Supp. 1991) (JA-50). Jurisdiction was alleged in the original complaint solely on the basis of 28 U.S.C. § 1332 (JA-32).

Statement of the Case

This case arises out of a dispute involving a group annuity contract, GAC 50, issued by Hancock to a pension plan for the benefit of employees of the Sperry Corporation.[4] The Second Circuit held that an unspecified portion of Hancock's General Account assets — those that the court described as "not referable to guaranteed benefits" payable under GAC 50 (PA-14) — are assets of the Sperry Plan and subject, therefore, to the fiduciary provisions of ERISA. In doing so, the Second Circuit rejected Hancock's contention that under ERISA's "guaranteed benefit policy" provision, ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2) (1988) (PA-94), none of Hancock's General Account assets are assets of the Sperry Plan.

The judgment below should be reversed, because the Second Circuit's construction of the "guaranteed benefit policy" provision is at odds with the plain meaning of that section and with ERISA as a whole. That court's interpretation of section 401(b)(2) is also contrary to the statute's object and policy, its legislative history and the consistent and long-standing interpretation of the statute by the Department of Labor (the "DOL"), the agency charged by Congress with implementing and enforcing ERISA.

The Second Circuit's construction of ERISA, if correct, would create an irreconcilable conflict between federal and state law. The management and administration of an insurer's General

[4] Although the original contractholder of GAC 50 was The Sperry Corporation (together with various affiliated companies), that entity has undergone numerous changes in name and corporate form since 1941. For convenience, however, that entity will be referred to throughout this brief as "Sperry," and the employee benefit plan sponsored by that entity will be referred to as the "Sperry Plan." By an amendment to the contract effective May 1, 1978, the rights of the contractholder were transferred from Sperry to Chase Manhattan Bank, N.A., as Trustee of The Sperry Rand Master Retirement Trust No. 2 ("Chase"). Chase, acting in its capacity as trustee of the Sperry Plan, was originally the named plaintiff in this lawsuit. As of October 1, 1987, Chase was replaced as trustee by Harris Trust, and Harris Trust has been substituted as plaintiff. Chase and Harris Trust in their capacities as trustee are referred to herein as "Harris Trust."

Account, which consists of all its general corporate assets, have historically been subject solely to state regulation, in accordance with the basic federal policy set forth in the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1988 & Supp. 1991) (PA-93), that the regulation of the business of insurance be left to the States. State law requires that insurers deal fairly and equitably and in a nondiscriminatory manner with all policyholders, including pension plan policyholders. ERISA, on the other hand, requires that a fiduciary discharge his duties with regard to a pension plan solely in the interest of, and for the exclusive purpose of providing benefits to, a plan's participants. ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. 1991) (PA-94). If the Second Circuit's ruling is upheld, the General Account operations of insurers will be subject to federal fiduciary rules that are in direct conflict with their obligations under state insurance law.

1. *ERISA's Fiduciary Provisions.*

ERISA contains a complex set of rules governing the conduct of a fiduciary, including the obligation that a fiduciary

> discharge his duties with respect to a plan solely in the interest of the [plan's] participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries.

ERISA § 404(a) (PA-94). Under ERISA, a fiduciary is any person who "exercises any authority or control respecting management or disposition" of a pension plan's assets. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988) (PA-93). An insurance company, like other persons, is not a fiduciary under ERISA unless the insurer has authority or control over the plan's assets.

Congress did not provide a comprehensive definition of the term "plan assets" in ERISA. In section 401(b)(2), ERISA's "guaranteed benefit policy" provision, however, Congress expressly declared that an insurer's assets held under a "policy or contract that provides for benefits the amount of which is guaranteed by the insurer" are not plan assets:

> (2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. . . .
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> * * *
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> (B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

ERISA § 401(b)(2) (PA-94). Under that provision, when an insurer has issued a contract that in its entirety provides for guaranteed benefits, only the contract is an asset of the plan, and the insurer's assets supporting its obligations under the contract are not plan assets.

In this case, the Second Circuit, rejecting the reasoning of the Third Circuit in *Mack Boring and Parts Corp. v. Meeker Sharkey Moffitt*, 930 F.2d 267 (3d Cir. 1991), construed the "guaranteed benefit policy" provision so as to apply the fiduciary rules to some but not all of an insurer's General Account assets. The Second Circuit acknowledged that GAC 50, a conventional type of group annuity contract issued by insurers to pension plans, is a policy or contract that provides for guaranteed benefits and that, in part at least, GAC 50 comes within the "guaranteed benefit policy" provision (PA-8). The court concluded, however, that the provision does not apply "to the extent that" any of Hancock's General Account assets are "not referable to guaranteed benefits" (PA-10, PA-14). With respect to those assets, the court held, Hancock is subject to ERISA's fiduciary rules (PA-10).

2. *The General Account.*

The General Account of an insurance company consists of all its general corporate assets, including, but not limited to, its office property, equipment and investments (JA-93, JA-178).

The insurance company combines in its General Account premiums received from all its lines of business, and all its General Account assets are available to satisfy all of the company's obligations to its policyholders, including all individual and group life, health, disability and annuity policyholders, as well as other creditors.[5] The General Account is also the insurance company's business operating account: General Account funds comprise all of the funds (and the only funds) available to the company for the conduct of its routine business activities, such as the payment of salaries, rent, taxes and other ordinary business expenses.[6]

Integral to the insurance relationship embodied in General Account contracts are the transfer of risk from the policyholder to the insurer, upon payment of the required premium, and the spreading of that risk among a vast number of insurance customers.[7] The premiums paid by those customers are pooled by the insurer and are invested on a commingled basis to achieve the greatest possible return, consistent with investment safety and the requirements of applicable state insurance laws and regulations.[8] The aggregate of all these invested premiums then stands behind all the insurer's obligations, with the exception of obligations supported by any Separate Account assets.[9]

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[5] Robert I. Mehr, *Fundamentals of Insurance* 9 (2d ed. 1986); Kenneth L. Walker, *Guaranteed Investment Contracts: Risk Analysis and Portfolio Strategies* 21 (1989).

[6] Dan M. McGill & Donald S. Grubbs, Jr., *Fundamentals of Private Pensions* 492 (6th ed. 1989).

[7] *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979); David J. Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 Iowa L. Rev. 57, 68-69 (1976).

[8] Mehr, *supra*, at 9; Walker, *supra*, at 21; McGill & Grubbs, *supra*, at 492-93.

[9] An insurance company Separate Account is a segregated fund established pursuant to contract with one or more customers, including, typically, employee benefit plans. *See* ERISA § 3(17), 29 U.S.C. § 1002(17) (1988). Under Separate Account arrangements, assets held are invested separately, and the results of the investments are passed through to the customer directly, frequently in the form of variable annuity benefits. *See infra* notes 27-28.

Through the pooling of premiums in the General Account, pension plans and other purchasers of insurance contracts are able to transfer and share risk among themselves in exchange for the insurer's contractual guarantees. Because all of the insurer's General Account assets are available to satisfy all of its obligations, the insurer is able to underwrite policies that guarantee a result acceptable to all policyholders, with no one policyholder suffering the adverse results that would surely confront some of them if all were to stand alone.[10]

Consistent with the concepts of pooled assets and shared risk, there are no specific assets identifiable with or referable to any particular General Account policy, to any portion of any policy, or to any specific benefits provided under a policy.[11] Instead, policyholders have contractual rights *vis-à-vis* the insurer that are supported by all of the insurer's General Account assets.[12] Premiums deposited in the General Account become the property of the insurance company.[13] The commingled funds in the General Account are invested and reinvested by insurers on an undifferentiated basis in various types of assets.[14] Since none of an insurer's assets is, or is capable of being, segregated, identified with or attributable to any particular contract or obligation, an insurer's General Account assets cannot be separately managed "solely in the interest of" or "for the exclusive benefit of" any particular policyholder.

3. *The Contract at Issue.*

GAC 50 is a common type of General Account group annuity contract issued to pension plans. In consideration of

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[10] Kenneth Black, Jr., & Harold D. Skipper, Jr., *Life Insurance* 14, 310-11 (11th ed. 1988).

[11] Walker, *supra*, at 21; McGill & Grubbs, *supra*, at 492.

[12] Black & Skipper, *supra*, at 119, 132-37; McGill & Grubbs, *supra*, at 492.

[13] McGill & Grubbs, *supra*, at 492.

[14] Mehr, *supra*, at 9; Walker, *supra*, at 21.

premiums paid by the plan, which become part of the insurer's General Account, the insurance company unconditionally guarantees to the contractholder that the insurer will pay pension benefits to participants specified by the plan, in fixed amounts determined by the plan (JA-120 to JA-123, JA-135 to JA-139).[15] The insurer's contractual commitment is backed by all of its General Account assets.

Contracts like GAC 50 are "participating" contracts (JA-85). Such contracts share, or "participate," in the positive investment experience of the insurance company's General Account through an allocation of net investment income or dividends (JA-85 to JA-88).[16] The book value of the premiums paid to the insurer, combined with any income or dividends allocated to the contract, less the amount of any benefits previously paid, may exceed the contractual cost of the benefits guaranteed under the contract (determined on the basis of the contract's annuity purchase rates) that the insurer has been instructed to provide.[17] Under such a contract, the contractholder has the option to require the insurer to use the full amount of the book value excess to provide additional guaranteed benefits to plan

[15] Typically, pension plan participants are entitled to receive fixed monthly benefit payments from the plan, which may be paid directly by the plan. McGill & Grubbs, *supra*, at 27-28. If a pension plan enters into a group annuity contract with an insurance company, however, the insurer, in consideration of the premiums received, will contractually guarantee the monthly benefit specified by the plan and pay such benefits to the designated plan participants. Mehr, *supra*, at 465; Black & Skipper, *supra*, 494-98.

[16] McGill & Grubbs, *supra*, at 493; Mehr, *supra*, at 455-56; Black & Skipper, *supra*, at 496-97. The contract's participation in the insurer's experience, whether positive or negative, has no effect on the insurance company's guarantee of benefit payments to plan participants. Once those guarantees are made, they are not affected by the contract's experience, and payment of the contractually guaranteed benefits is backed by the entire General Account, without regard to the insurer's mortality, expense or investment experience. *See* Black & Skipper, *supra*, at 497.

[17] McGill & Grubbs, *supra*, at 493; Mehr, *supra*, at 455-56; Black & Skipper, *supra*, at 496-97.

participants, and the insurer is contractually obligated to do so.[18]

GAC 50 expressly requires that the assets held by Hancock under the contract be part of the General Account (except to the extent that Harris Trust has directed that assets be transferred to a Separate Account)[19] (JA-117) and that all monies paid to Hancock become part of its "general corporate funds" (JA-178 to JA-179). The contract further states that it is a participating contract and that Hancock shall allocate to the contract each year the contract's share of the net interest and capital gains and losses of the company, in accordance with regular procedures determined by the company for contracts of the same class (JA-92).[20] GAC 50 guarantees the payment of benefits to plan participants, which are not affected or terminated even

[18] Mehr, *supra*, at 455. The contractholder may have other options as well. *See McGill & Grubbs*, *supra*, at 497. For example, the contractholder may have the right to transfer the book value excess from the General Account to a Separate Account, subject to a "market value adjustment" that adjusts the book value of the transferred assets to their current market value. Second, the contractholder might have the right to transfer the book value excess, again subject to a "market value adjustment," to another insurance company, to another investment medium, such as a bank trust account, or to the plan itself. Finally, the contractholder might have the right to require the insurer to apply the excess for the payment to plan participants of fixed monthly benefits payable under the plan that are not guaranteed by the insurer. GAC 50 provided each of these options (JA-140 to JA-144, JA-230 to JA-231, JA-247 to JA-248).

[19] From time to time, Harris Trust caused funds to be transferred from Hancock's General Account to the Separate Account established under GAC 50. Hancock's status under ERISA with respect to any assets transferred to the Separate Account under GAC 50 is not at issue in this case.

[20] From its inception in 1941 until December 31, 1967, GAC 50 was a dividend-rated participating Deferred Annuity contract (JA-84, JA-86). By an amendment effective as of January 1, 1968, the contract was converted to a direct-rated Retrospective Immediate Participation Guarantee ("Retro-IPC") form of contract (JA-87) and was thereafter a partially direct-rated and partially dividend-rated participating contract (JA-86 to JA-87). The preexisting guarantees of benefits to plan participants were not affected by the conversion (JA-89). After the conversion in 1968, Hancock provided additional guaranteed benefits in accordance with the contract (PA-67). Although GAC 50 was amended on a number of other occasions, Hancock's guarantees to plan participants under the contract, for both pre-1968 and post-1968 benefits, have not changed in any way

if (i) there is a subsequent breach of the contract by Harris Trust or (ii) the premiums paid by Harris Trust, together with the investment income allocated to the contract, are insufficient to provide the pension benefits Hancock had obligated itself to pay (JA-89 to JA-91, JA-135 to JA-139; PA-65).[21] Finally, Harris Trust, as contractholder, could at any time, if it elected to do so, require Hancock to use the contract's book value in excess of the contractual cost of the existing guaranteed benefits (the so-called "free funds") to provide additional guaranteed benefits on the basis of the annuity purchase rates fixed in the contract (JA-90).

4. *State Regulation of Insurance.*

An insurance company's administration of its General Account and its obligations to its policyholders are governed by state insurance laws and regulations as well as contract provisions. Under state law, General Account assets are available to satisfy an insurer's obligations to all its policyholders and creditors. To assure that those assets are invested prudently and that insurers deal evenhandedly with all classes of policyholders, each of the States, in accordance with the national policy underlying the McCarran-Ferguson Act (PA-93), has developed a comprehensive framework of insurance company regulation.[22]

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[21] Under GAC 50 in its Retro-IPG form, the book value of the contract is called the Pension Administration Fund, or "PAF," and the contractual cost of the guaranteed benefits as they exist at any time is called the Liability of the Fund, or "LOF." The contract requires the contractholder to maintain the PAF in an amount at least equal to the LOF (and, in certain circumstances, in an amount at least equal to 105% of the LOF, *i.e.*, the contract's Minimum Operating Level, or "MOL"). In the event that the amount of the PAF becomes less than the LOF, the contractholder is obligated to contribute additional funds to Hancock's General Account to increase the account balance of the PAF to the required level (JA-89 to JA-90). If the contractholder failed to do so, certain events could cause the contract to revert to a Deferred Annuity form of contract (JA-89 to JA-90). The benefits that have been guaranteed to plan participants under the contract are not affected by any of these events (JA-90 to JA-91).

[22] Black & Skipper, *supra*, at 119, 572-83; Robert E. Keeton, *Basic Text on Insurance Law* 554-57 (1971); 2A George J. Couch, *Couch on Insurance* §§ 21:23 to 21:33, 21:35 to 21:37, 21:40 to 21:41, 22:10, 22:32, 22:34 (2d ed. 1984). For example, the form and content of insurance contracts, including group

(Footnote continued)

An insurance company's General Account operations have historically been subject to a substantial body of state laws and regulations.[23] For example, there are laws that limit the types of investments that can be made with General Account assets and require the diversification of investments and the maintenance of reserves. *E.g.*, N.Y. Ins. Law §§ 1402, 1403, 1409 (McKinney 1985); Mass. Gen. Laws ch. 175, § 66B (West 1987 & Supp. 1993) (authorizing the use of General Account assets to invest in home office properties). Similarly, an insurer's allocation of income and expenses within its General Account is specifically regulated by state insurance departments, which, in Hancock's case, have endorsed its "investment year method" for distributing net investment income. *See* N.Y. Comp. Codes R. & Regs. tit. 11, § 91.1 *et seq.* (1993). Furthermore, both the determination of the amount of divisible surplus available to be paid to an insurance company's policyholders and the payment of dividends have traditionally been matters subject to exclusive state regulation. *See, e.g.*, Mass. Gen. Laws ch. 175, § 93E (West 1987); N.Y. Ins. Law § 4231 (McKinney 1985 & Supp. 1993).[24]

ERISA's fiduciary provisions, if applied to a General Account contract, would be irreconcilably in conflict with state law. In contrast to the ERISA standard, which requires that a fiduciary act "solely in the interest of" a particular plan and its participants, state insurance laws and regulations require that General Account assets be administered to spread risk fairly and equitably among

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annuity contracts, are typically subject to the review and approval of the state insurance departments where they are issued. *See, e.g.*, N.Y. Ins. Law § 3201(b)(1) (McKinney 1985 & Supp. 1993). GAC 50 and each of its amendments, as required by New York law, were submitted to and approved by the New York State Insurance Department (JA-110, JA-216, JA-217, JA-219, JA-222, JA-224, JA-240, JA-250, JA-263).

[23] *See* Brief of the State of New York as *Amicus Curiae* in Support of the Petition for a Writ of Certiorari (Jan. 21, 1993) ("NYS Brief") at 11-12; Brummond, *supra*, at 81-83.

[24] In this case, despite the fact that they are subject to state regulatory supervision, Harris Trust challenged under ERISA's fiduciary rules a broad range

(Footnote continued)

all life, health, employee benefit and other contractholders whose contract rights are supported by such assets. As the Third Circuit recently noted:

> These state-imposed duties do not mesh easily with ERISA's requirement that plan assets be managed "solely in the interest" of plan customers. Whenever an insurance company acts "solely in the interest" of a pension plan customer, it would violate state law. Whenever an insurance company takes actions to ensure that under state law, it is treating its policyholders fairly and equitably, it runs the risk of violating ERISA's fiduciary requirements.

Mack Boring, 930 F.2d at 275 n.17. If ERISA's fiduciary rules are made applicable to General Account operations, fundamental insurance company policies and practices that are sanctioned, if not mandated, by state law would be open to challenge.[25]

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of Hancock's General Account acts and practices, including its investment decisions, its method of allocating investment income among its lines of business, and its determinations regarding dividends (PA-6 to PA-7). Indeed, Harris Trust argued in the lower courts that, if ERISA's fiduciary provisions applied, a number of Hancock's routine business practices would be *per se* unlawful and that Hancock should be held liable for ERISA penalties as well as money damages. For example, Harris Trust challenged Hancock's investment in its home office building as a *per se* violation of ERISA § 406, 29 U.S.C. § 1106 (1988), even though such an investment is permitted under state law (PA-31 to PA-32).

[25] In its original complaint in this case, Harris Trust alleged some 13 causes of action, which sounded generally in common law breach of contract and common law breach of fiduciary duty, relating to Hancock's administration of GAC 50 (JA-39 to JA-46). No mention was made of ERISA (JA-32). Almost one year later, Harris Trust amended its complaint to allege, as its first cause of action, that all of Hancock's conduct previously alleged to have violated Harris Trust's rights at common law also violated ERISA (JA-50). In *Harris I*, the district court granted summary judgment dismissing all of Harris Trust's ERISA claims (PA-62). In *Harris II*, that court granted summary judgment dismissing all of Harris Trust's common law claims (PA-87). Harris Trust now contends, in effect, that Hancock should be held liable under ERISA with regard to its General Account activities, despite the fact that all of Harris Trust's state law claims relating to those activities have been dismissed on the merits.

Summary of Argument

The provisions of ERISA, read as a whole, plainly show that the statute's fiduciary rules do not apply to an insurance company's General Account assets in connection with contracts like GAC 50. The "guaranteed benefit policy" provision makes clear that insurance contracts, not the insurer's assets, are plan assets. That provision distinguishes between assets held in Separate Accounts, which support the payment of variable annuity benefits, and General Account assets, which support the payment of fixed guaranteed benefits. Because (i) all the assets supporting GAC 50 are General Account assets and (ii) Hancock is contractually obligated, at the contractholder's direction, to provide fixed guaranteed benefits to the full extent of those assets, GAC 50 in its entirety is a "guaranteed benefit policy," and none of Hancock's General Account assets constitute plan assets.

Hancock's construction of the "guaranteed benefit policy" provision is in harmony with all the other provisions of ERISA. Its interpretation construes the word "benefits" in section 401(b)(2)(B) as referring to a benefit payment to a plan participant or beneficiary, the same sense in which that word is used in the more than 30 other instances in which it appears in ERISA. It is also consistent with the statute's treatment of investment company securities and assets, which closely parallels the treatment of insurance company policies and assets. Lastly, that construction is consistent with ERISA's complementary provisions dealing with Separate Accounts and Separate Account assets.

In contrast, the Second Circuit's construction, which focuses narrowly and exclusively on the "to the extent that" phrase in section 401(b)(2)(B), ignores the remainder of that section, as well as the other relevant provisions of ERISA, and renders the statute internally inconsistent. That court's ruling also subjects the management and administration of an insurer's General Account to federal regulation under ERISA, in direct contravention of the McCarran-Ferguson Act and ERISA's preemption saving clause, ERISA § 514(b), 29 U.S.C. § 1144(b) (1988 & Supp. 1991) (PA-95). In the saving clause, Congress expressly reaffirmed

the long-standing federal policy, set forth in McCarran-Ferguson, of leaving the regulation of the business of insurance to the States.

The Second Circuit's construction lacks any support whatever in ERISA's legislative history. Nowhere in the statute itself or in its vast legislative history is there any evidence of a congressional intent to work the radical restructuring of federal and state responsibilities that would necessarily result from the treatment of General Account assets as plan assets.[26] Congress understood that the business of insurance is subject to an elaborate system of state regulation designed to protect the solvency of insurers and assure the payment of benefits to all policyholders. There is not one sentence in ERISA's extensive legislative history that supports an interpretation of ERISA that would displace that comprehensive system of regulation or superimpose federal requirements on the existing state regulatory regime. As the Third Circuit noted in *Mack Boring*:

> [I]f Congress had intended so severe a disruption of insurance practices, practices that had been in existence for almost three decades before the enactment of ERISA, it would have made its intention perfectly clear. . . . There is no such clear indication in the legislative history of the guaranteed benefit policy exception. Indeed, the legislative history . . . points in the opposite direction.

930 F.2d at 275 n.17 (citations omitted).

Finally, since ERISA's enactment in 1974, the DOL has consistently stated that General Account assets do not constitute plan assets for purposes of ERISA's fiduciary rules. In keeping with its interpretation of the statute, the DOL, over a period of more than 18 years, has never once stated that ERISA's

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[26] Hancock has submitted with its Brief an appendix ("Appendix") containing a comprehensive index to the legislative history of ERISA, a list of the persons and organizations who submitted oral and written statements to Congress, and an identification of all other collateral written material submitted to Congress.

fiduciary provisions are applicable to the General Account practices of insurance companies and has never once sought to invoke those provisions with regard to those practices. In light of the statute's clear language and purpose, its unequivocal legislative history and the clash that would inevitably arise between ERISA's fiduciary provisions and state insurance regulation, any other interpretation of the statute is insupportable.

Argument

WITH RESPECT TO GAC 50, NONE OF HANCOCK'S GENERAL ACCOUNT ASSETS ARE "PLAN ASSETS" UNDER ERISA

In construing ERISA's fiduciary provisions, this Court should look to both the language of the "guaranteed benefit policy" provision and the statute as a whole. As the Court noted in *Massachusetts v. Morash*, 490 U.S. 107 (1989),

> in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.

Id. at 115 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)). The Second Circuit gave no heed to that governing principle of statutory construction, electing instead to rely upon its reading of a single phrase within one subparagraph of one subsection of the statute. In doing so, it reached a result contrary to the language and purpose of the "guaranteed benefit policy" provision, other provisions of the statute, the object and policy of both ERISA and the McCarran-Ferguson Act, ERISA's legislative history, and the DOL's long-standing interpretation of the statute.

A. *ERISA's Language and Purpose Make Clear That, Under Contracts Like GAC 50, General Account Assets Are Not Plan Assets.*

Congress enacted ERISA in 1974 for the purpose of curbing abuses in the private pension industry by imposing regulatory control over previously unregulated activities. *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 549, 570 (1979)

("Congress believed that it was filling a regulatory void when it enacted ERISA."). In recognition of the fact that pension plans were not subject to adequate safeguards, ERISA "sets forth reporting and disclosure obligations for plans, imposes a fiduciary standard of care for plan administrators, and establishes schedules for the vesting and accrual of pension benefits." *Massachusetts v. Morash*, 490 U.S. at 113.

To fill the perceived regulatory void, Congress created a federal fiduciary standard of conduct applicable to plan administrators and other persons having authority or control over a pension plan or the "management or disposition of its assets." ERISA § 3(21)(A) (PA-93). Although the statute does not fully delineate the circumstances under which assets in the possession of a third party will be considered "plan assets," section 401(b) clarifies the statute's application in two contexts – investment company securities and insurance company policies. That section provides:

> (1) In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 *et seq.*], the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such investment company.
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> (2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:
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> > (A) The term "insurer" means an insurance company, insurance service or insurance organization, qualified to do business in a State.
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> > (B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

ERISA § 401(b). Under those provisions, a plan's assets consist of the investment security or the insurance policy alone, not the underlying assets of the investment or insurance company. Accordingly, monies paid by the plan to an investment company or an insurance company lose their identity as the plan's assets once they are received and become part of the recipient's general corporate assets. Thereafter, the plan's assets are its rights under the security or policy issued to the plan, as the case may be. In neither situation are the recipient company's underlying assets deemed to be "plan assets."

The language of section 401(b)(2) defines a "guaranteed benefit policy" in terms of two fundamental distinctions. First, the section distinguishes contracts written on Separate Accounts from those written on the General Account. Second, the provision distinguishes "guaranteed" benefits, which are annuities payable in fixed amounts to plan participants from the insurer's General Account, from other benefits, in particular, variable annuity benefits, which by state law can only be issued on insurance company Separate Accounts. In contrast to the Third Circuit in *Mack Boring*, the Second Circuit misunderstood and misapplied section 401(b)(2), because it failed to recognize those distinctions.

The Second Circuit also misconstrued the use in section 401(b)(2) of the word "benefits," which is repeatedly used elsewhere in the statute to refer to payments to plan participants. Its misinterpretation of that key word caused it to misread the section by focusing on fixed versus variable rates of return to the plan sponsor, about which the statute says nothing. Finally, the court misconstrued the "to the extent that" and "provides for" language by attempting to bifurcate the contract, even though, under GAC 50, Hancock is obligated to the full extent of the book value of the contract to provide guaranteed benefits at the direction of the contractholder.

1. *Section 401(b)(2) Distinguishes Separate Account Contracts From General Account Contracts.*

Section 401(b)(2)(B) draws a fundamental distinction between policies that provide for fixed benefits guaranteed with all of the

insurer's General Account assets and policies that provide for variable annuity benefits supported by segregated assets held in a Separate Account.[27] The section explicitly states that assets in a Separate Account (apart from the insurer's own funds, or "surplus") do not come within the definition of "guaranteed benefit policy" and may therefore be plan assets subject to the fiduciary provisions.[28] In contrast, insurance company assets not maintained in a Separate Account, *i.e.*, General Account assets, are not plan assets if they are held in connection with a "guaranteed benefit policy." The distinction drawn by Congress in section 401(b)(2)(B) between Separate Account and General Account assets reflects the fundamental differences between such accounts, their different regulatory status under state law, and Congress' separate and distinct treatment of Separate Accounts elsewhere in ERISA.

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[27] Insurance company Separate Accounts are defined in ERISA § 3(17), which provides:

> The term "separate account" means an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

Provisions specifically related to such accounts are set forth elsewhere in the statute. *See, e.g.*, ERISA §§ 103(a)(2), 408(b)(8), 29 U.S.C. §§ 1023(a)(2), 1108(b)(8) (1988).

[28] The legislative history of ERISA reflects Congress' intent to apply the statute's fiduciary rules in the context of Separate Account assets:

> Additionally, it is understood that assets placed in a separate account managed by an insurance company are separately managed and the insurance company's payments generally are based on the investment performance of these particular assets. Consequently, insurance companies are to be responsible under the general fiduciary rules with respect to assets held under separate account contracts, and the assets of these contracts are to be considered as plan assets (but need not be held in trust).

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 296 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5037, 5077, *and in* III Legislative History of ERISA, at 4563 (1976) ("Conference Report").

Under Separate Account contracts, funds held by the insurer are invested separately, the results of investments are passed through to the policyholder directly (frequently in the form of variable annuity benefits), and the insurance company does not provide a guarantee of the benefits payable to plan participants.[29] McGill & Grubbs, *supra*, at 495; Black & Skipper, *supra*, at 497, 537, 557. Under state law, variable annuities, which provide participants with benefits that vary in amount with investment performance, can be issued only from Separate Accounts, not out of an insurer's General Account.[30] Furthermore, the investments made by an insurance company with Separate Account

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[29] The distinction between fixed and variable annuity benefits is well recognized. As this Court explained in *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959):

> While all the States regulate "annuities" under their "insurance" laws, traditionally and customarily they have been fixed annuities, offering the annuitant specified and definite amounts beginning with a certain year of his or her life. The standards for investment of funds underlying these annuities have been conservative. The variable annuity introduced two new features. First, premiums collected are invested to a greater degree in common stocks and other equities. Second, benefit payments vary with the success of the investment policy.

Id. at 69.

[30] The insurance laws of all 50 States require that variable annuities be issued from Separate Accounts. *See, e.g.*, D.C. Code Ann. § 35-639 (1981); Mass. Gen. Laws Ann. ch. 175, §§ 132F-132H (1987); N.H. Rev. Stat. Ann. §§ 408:30-408:31 (1991); N.J. Stat. Ann. § 17B:28-1 (1985); N.Y. Ins. Law § 4240 (1985 & Supp. 1993); Ariz. Comp. Admin. R. & Regs. § 4-14-707(D)(4) (1992); Cal. Code Regs. tit. 10, § 2528 (1993); Conn. Agencies Regs. § 38-154a-6 (1985); D.C. Mun. Regs. tit. 26, § 1004.12 (1990); Ill. Admin. Code tit. 50, § 1451.40 (1992); Code Me. R. 310, art. VIII (1984); Mo. Code Regs. tit. 20, § 400-1.020 (1991); N.Y. Comp. Codes R. & Regs. tit. 11, § 50.1 (1993); N.D. Admin. Code §§ 45-04-02-02, 40-04-02-04 (1992); S.D. Admin. R. 20:06:07:03 (1993); Tex. Admin. Code tit. 28, §§ 3.702-.704 (1988); Wis. Admin. Code § Ins. 2.13 (Apr. 1992); Wyo. Admin. Code ch. 16.1, § 5 (1992). *See* DOL Advisory Opinion 78-8A (Mar. 13, 1978) (distinguishing between General Account and Separate Account contracts and stating that state insurance laws "prohibit an insurance company from placing premiums paid for variable annuity contracts in a general asset account").

assets are not subject to the same elaborate regulation under state law as are General Account investments,[31] and variable annuities are not considered to be within the "business of insurance" under McCarran-Ferguson. *Variable Annuity Life Ins. Co.*, 359 U.S. at 71.

In contrast, General Account assets are the property of the insurer and support the insurer's guarantees under all its General Account contracts, as well as its obligations to all its other creditors. McGill & Grubbs, *supra*, at 492. Only fixed benefits, like those payable under GAC 50, may be paid from an insurer's General Account assets.[32] An insurer's General Account assets and operations are subject to comprehensive state regulation in accordance with McCarran-Ferguson. The "guaranteed benefit policy" provision quite reasonably recognizes that, so long as an insurer has guaranteed the benefits payable to plan

[31] As described in Black & Skipper, a leading text on insurance company products for pension plans:

> The variable annuity contract provides benefits that vary directly with the investment experience of the assets that back the contract. Assets backing variable annuities, like those backing variable life policies, are maintained in a separate account and the investment results of this account are reflected directly in the variable annuity values. In contrast, the assets backing the products discussed earlier are those of the life insurer's general account.
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> • • •
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> *The general account of an insurance company is restricted by state laws to the type and quality of investments it may hold.* Since these investments support liabilities for products with interest guarantees, they must offer safety of principal and a predictable income stream. *Separate accounts have few, if any, investment restrictions.* Income, gains, and losses on separate account assets are credited to or charged against the separate account. Income, gains, and losses on the rest of the company's business are kept apart from the separate account. Funds of variable annuity contract owners are held in the separate account, and the contract owners participate fully in the investment results.

Id. Black & Skipper, *supra*, at 107 (emphases added).

[32] *E.g.*, *Spellacy v. American Life Ins. Ass'n*, 131 A.2d 834 (Conn. 1957) (under state law, only policies for the payment of fixed benefits may be issued from insurers' General Accounts). *See generally Variable Annuity Life Ins. Co.*, 359 U.S. at 69-70 (discussing history of fixed and variable annuities).

participants with the entirety of its General Account assets, federal regulation under ERISA is unnecessary.[33] The statute provides, therefore, that General Account assets under contracts like GAC 50 are not plan assets and are not subject, therefore, to the statute's fiduciary rules.[34] The Second Circuit misconstrued section 401(b)(2), because it failed to give effect to the fundamental distinction between General Account and Separate Account contracts.[35]

[33] *See* DOL Proposed Regulations Relating to Definition of Plan Assets, 44 Fed. Reg. 50,363, 50,364 (1979) (to be codified at 29 C.F.R. pt. 2550) (proposed Aug. 28, 1979) (Section 401(b)(2)'s "exemption for contracts or policies issued by insurers and funded by insurers' general accounts also appears to be based upon the fact that the plan benefits provided under such contracts or policies are insured by an entity which is subject to state regulation designed to assure the entity's ability to pay benefits specified in the policy when due. Obviously, such protections are not available with respect to some other types of pooled investments."); McGill & Grubbs, *supra*, at 439 (General Account assets are exempted from ERISA's fiduciary responsibility provisions, because "the general account operations, including its investment activities, are adequately supervised by state regulatory authority."). A similar rationale applied to the exemption for investment companies. *See* Conference Report, *supra*, at 5077 ("Since mutual funds are regulated by the Investment Company Act of 1940 and, since (under the Internal Revenue Code) mutual funds must be broadly held, it is not considered necessary to apply the fiduciary rules to mutual funds merely because plans invest in their shares.").

[34] The second sentence of section 401(b)(2)(B) includes "surplus" in a Separate Account within the definition of "guaranteed benefit policy." The Conference Report explained that Separate Account surplus is created when "insurance companies place some of their own funds [*i.e.*, General Account funds] in . . . separate accounts to provide for contingencies. . . ." Conference Report, *supra*, at 5077. Thus, Congress exempted General Account assets from ERISA's fiduciary provisions if such assets were transferred to a Separate Account. It would be illogical in the extreme if Congress, having excluded General Account assets transferred to a Separate Account, did not intend the same result with respect to General Account funds that remained in the General Account. *Cf. Mack Boring*, 930 F.2d at 272.

[35] The Second Circuit's decision is also flawed, because it accords Separate Account and General Account contracts the same treatment if they contain a guaranteed rate of return to the plan sponsor. The Second Circuit relied upon two DOL Advisory Opinions, Nos. 78-8A and 83-51A, misconstruing

(Footnote continued)

2. *Section 401(b)(2) Draws a Distinction Between Contracts Providing Fixed and Variable Benefits to Participants Rather Than Between Contracts Providing Fixed and Variable Rates of Return to Plan Sponsors.*

A "guaranteed benefit policy" is defined as an insurance contract providing for "benefits the amount of which is guaranteed by the insurer." ERISA § 401(b)(2)(B). The definition turns

them as stating that a General Account contract comes within the meaning of "guaranteed benefit policy" if it provides for a fixed rate of return, whether or not it also provides for fixed guaranteed benefits. In these Advisory Opinions, however, the DOL was addressing whether Separate Account contracts were subject to ERISA's fiduciary provisions.

In Opinion No. 78-8A, the DOL, relying upon the Conference Report, concluded that a particular insurer's basic asset account should be considered a Separate Account, even though denominated a "general account," because

> *the annuity payments to which a participant or beneficiary will be entitled are dependent upon the investment performance of the assets held by CREF.* The CREF account thus constitutes a *separate account* as defined by [ERISA] and the assets therein are plan assets pursuant to section 401(b)(2).

DOL Advisory Opinion No. 78-8A, at 5 (Mar. 13, 1978) (emphases added) (A-107). In Opinion No. 83-51A, the DOL determined that, since the Separate Account contracts involved

> provide for fixed obligations of the insurance company and ... *the investment performance of the separate accounts ... [does] not, in any circumstances, affect the insurance company's obligations* to either the plan to which the contract is issued or to its participants and beneficiaries, such separate accounts would therefore not be considered to hold "plan assets."

DOL Advisory Opinion No. 83-51A, at 2-3 (Sept. 21, 1983) (emphasis added) (A-112). The requirement stated in Opinion No. 83-51A that return must be guaranteed in order for assets to escape treatment as plan assets applies only to assets in a Separate Account, in recognition of the fact that the second sentence of section 401(b) applies specifically to that type of contract. No such requirement has ever been articulated by the DOL or Congress with respect to General Account assets. *See* 29 C.F.R. § 2510.3-101(h)(1)(iii) (1991) (Separate Account assets are not plan assets if amounts paid to the pension plan or plan participants are not affected in any manner by investment performance of the Separate Account).

upon the nature of the benefits provided to plan participants under the contract. The Second Circuit misunderstood the distinction drawn by Congress between fixed and variable annuity benefits payable to plan participants and erroneously concluded that, in using the word "benefits" in section 401(b)(2)(B), Congress intended to distinguish between fixed and variable rates of return.

The Second Circuit improperly equated the word "benefits" with the return to the pension plan sponsor under a participating contract, which will vary in amount with the investment performance of the General Account. The court of appeals said:

> Although Hancock provides guarantees with respect to one portion of the benefits derived from the contract, it does not do so at all times with respect to all the benefits derived from the other, or free funds, portion. *The non-guaranteed portion is dependent upon the insurer's investment experience and therefore is variable with respect to the benefits it provides.*

(PA-8 to PA-9) (emphasis added). The Second Circuit ignored the fact that ERISA uniformly uses the word "benefits" to refer to benefit payments to plan participants and that, under GAC 50, they do not vary in amount.[36] The court erred in its analysis, because the return to the plan sponsor is irrelevant under section 401(b)(2)(B) in determining whether or not an insurance contract provides for guaranteed benefits.[37]

The Second Circuit paid no heed to the statute's consistent use of the term "benefits." In the more than 30 instances, in addition to the reference in section 401(b)(2), in which ERISA refers

[36] It is not disputed that all the benefits payable under GAC 50 are fixed benefits, payable to plan participants in amounts determined by the provisions of the Sperry Plan. The contract does not provide for any benefits to participants in amounts that vary based upon the experience of Hancock's General Account (JA-121, JA-241 to JA-243).

[37] The fact that a contract participates in the varying investment experience of an insurer's General Account does not transform a fixed benefit contract into a variable annuity policy. *Spellacy*, 131 A.2d at 839-40.

to a "benefit,"[38] that term is used in connection with a payment to a plan participant or beneficiary.[39] In no instance did Congress use the term "benefit" in ERISA in any other sense.[40] The term "benefits" in the "guaranteed benefit policy" provision,

[38] *See, e.g.*, ERISA §§ 3(2), 3(7), 3(8), 3(19), 3(22), 3(23), 3(34)-(36), 103(b), (d) and (e), 105(a), 203(a)-(e), 204(b)-(h), 206(a)-(d), 301(b)(2)-(3), 404(a)(1), 408(c)(1), 4022A, 29 U.S.C. §§ 1002(2), 1002(7), 1002(8), 1002(19), 1002(22), 1002(23), 1002(34)-(36), 1023(b), (d) and (e), 1025(a), 1053(a)-(e), 1054(b)-(h), 1056(a)-(d), 1081(b)(2)-(3), 1104(a)(1), 1108(c)(1), 1322(a) (1988 & Supp. 1991).

[39] *See, e.g.*, § 3(7) (defining a "participant" as one "who is or may become eligible to receive a benefit of any type from an employee benefit plan"); § 3(8) (defining a "beneficiary" as one "designated by a participant . . . who is or may become entitled to a benefit"); § 3(22) (defining participant's entitlement to "normal retirement benefit"); § 3(23) (defining a participant's "accrued benefit"); § 103(e) (referring to benefit payments to participants which have been guaranteed by insurance companies). *See also Mack Boring*, 930 F.2d at 273 ("the term 'benefit,' when used in ERISA, uniformly refers only to payments due the plan participants or beneficiaries"); *Harris I* (PA-57 to PA-58) (same). The DOL has confirmed this definition of the term "benefits." *See* Advisory Opinion No. 78-8A, *supra*, at 5 (construing section 401(b)(2) as referring to "the payments to which a participant or beneficiary would be entitled") (A-107).

[40] The Second Circuit, in rejecting Congress' consistent use of the term "benefit" throughout the statute as referring to a benefit payment to a participant, purported to rely upon language in the Conference Report. In that respect, the court of appeals again erred. That report states:

> An insurance company also is not considered to hold plan assets if a plan purchases an insurance policy from it, to the extent that the policy provides payments guaranteed by the company. If the policy guarantees basic payments but other payments vary with, *e.g.*, investment performance, then the variable part of the policy and the assets attributable thereto are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules.

Conference Report, *supra*, at 5077. The Second Circuit apparently construed the word "payments" as referring to investment income allocated to the contract. It is clear, however, that the Conference Committee used "basic payments" to refer to fixed benefits payable to participants and "other payments" to mean variable benefits in order to distinguish fixed annuities supported by the insurer's General Account from variable annuities payable out of a Separate Account. *See Mack Boring*, 930 F.2d at 275 ("there is no indication that the word 'payments' in the Conference Report has a meaning

(Footnote continued)

therefore, is meant to refer to benefit payments provided to plan participants and beneficiaries "the amount of which is guaranteed by the insurer."[41] The term "guaranteed benefit" cannot properly be interpreted, as the Second Circuit construed it, to mean a guaranteed rate of return to either the plan or the plan sponsor.[42]

different from the meaning we give to the word 'benefits' in the statute"); *Harris I* (PA-57 to PA-58) ("The word 'benefit' in the guaranteed benefit policy exception, and the word 'payment' in the conference report, are no different; they too refer to benefits and payments to covered employees.").

[41] It is an established principle of statutory construction that, when a word is used in more than one instance in a statute, it should be construed to have the same meaning in all instances. *See Sullivan v. Stroop*, 496 U.S. 478, 482 (1990); *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.' "); 2A Norman J. Singer & C. Dallas Sands, *Sutherland Statutory Construction* § 47.16 (4th ed. 1984 & Supp. 1989) (where the same word is used in more than one part of a statute, there is an "assumption that it means the same thing throughout the statute"). The Second Circuit's decision violates that principle by giving "benefit" a meaning in the "guaranteed benefit policy" provision different from its meaning in every other section of ERISA.

[42] The only arguably contrary circuit court authority, other than the Second Circuit decision, is the Seventh Circuit's decision in *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320 (7th Cir. 1983). That decision is neither sound authority nor substantively correct. The Seventh Circuit reversed the district court's dismissal of the complaint, finding that a claim under ERISA had been stated, but did not decide on the merits that ERISA's fiduciary provisions applied to an insurer's contractual obligations under a General Account group annuity contract. *Id.* at 326-28. Upon rehearing, the Seventh Circuit expressly acknowledged the narrow context within which its opinion had been rendered ("merely" dismissal on the pleadings) and acknowledged that there were a "number of arguments" that ERISA had no applicability to the contract at issue in that case that the court had not considered. *Id.* at 328.

Examination of the court's reasoning in *Peoria* demonstrates that its broad conclusion was ill considered. The decision was made without reference to the DOL's interpretation of ERISA and without any evident understanding of the practical reasons why ERISA could not apply in the context presented. In addition, *Peoria* contains only the most casual analysis of the "guaranteed benefit policy" provision.

(Footnote continued)

3. The Phrases "To the Extent That" and "Provides for" Do Not Mean That General Account Contracts Are to Be Bifurcated Into Guaranteed and Non-Guaranteed Portions.

The Second Circuit also misconstrued the "to the extent that" and "provides for" phrases in section 401(b)(2) as requiring an analysis of whether there are guaranteed and non-guaranteed portions of a General Account contract. The court identified the contractual cost of the existing benefits as the "guaranteed" portion of the contract and treated the contract's book value in excess of that cost as the "non-guaranteed" portion (PA-8 to PA-9). In doing so, it ignored the facts that (i) under GAC 50, Harris Trust can require Hancock to provide additional guaranteed benefits and (ii) the contract does not provide for the payment of any variable annuity benefits.

Under GAC 50, Hancock is obligated to the full extent of the book value of the contract to provide fixed guaranteed benefits at the direction of Harris Trust (JA-90, JA-96 to JA-97). Harris Trust, on the other hand, has the right, but not the obligation, to use any "free funds" to purchase future guaranteed benefits under the contract, in addition to benefits previously guaranteed. As the Third Circuit held in *Mack Boring*, nothing in section 401(b)(2) "require[s] that the benefits contracted for be delivered immediately." 930 F.2d at 273. Accordingly, Hancock's obligation to provide future guaranteed benefits under the contract satisfies the "provides for" language of that section.[43]

Moreover, in reversing a dismissal of the plaintiff's case on the pleadings, the circuit court based its decision on a broadly stated but patently unsound finding that an insurance company issuing a participating General Account contract is no different from "an investment advisor . . . given . . . authority to buy and sell securities at his discretion for the plan's account." 698 F.2d at 327. That analogy does not withstand even the most cursory examination. In contrast to the management of an insurance company General Account, upon which rests the guarantee of fixed benefit payments by the company, an investment advisor who administers a pool of assets assumes no risks and offers no guarantees of any kind. The superficiality of the court's analysis in *Peoria*, together with the uncertainties expressed by the court itself upon rehearing, demonstrates that the decision is entitled to little weight.

[43] The words "provide for" as they are commonly understood mean to make provision for prospectively. *See Mack Boring*, 930 F.2d at 273 ("The dictionary definition of 'provide' is to 'make, procure, or furnish for future use, prepare. To supply; to afford; to contribute.' ") (quoting Black's Law Dictionary (5th ed. 1979)).

Moreover, given the distinctions in section 401(b)(2)(B) between General Account and Separate Account assets and between fixed and variable annuities, the "to the extent that" phrase can only be read to refer to an insurance company's obligation to pay fixed guaranteed benefits, rather than variable annuity benefits. The Third Circuit adopted that construction in *Mack Boring*:

> All benefits due plan participants under the DA contract at issue were guaranteed. There were no variable payments. Only payments owed to [the Plan] could be considered variable. As such, the entire DA contract comports with the "to the extent" limitation imposed on the definition of guaranteed benefit policy. Because the [contract] was a general account insurance contract which provided in its entirety for a guaranteed, fixed amount of benefits to be paid to the plan participants upon their retirement, we therefore conclude that, at least on its face, the guaranteed benefit policy exception of section 401(b)(2) encompasses the contract.

930 F.2d at 274-75 (footnotes omitted). Therefore, "to the extent that" a group annuity contract obligates the insurer to pay fixed, rather than variable, benefits to plan participants, it "provides for" guaranteed benefits. GAC 50 is a "guaranteed benefit policy" in its entirety, because none of Hancock's General Account assets can be used to pay any variable annuity benefits and the contract does not provide for the payment by Hancock of any such benefits.[44]

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[44] The 1977 Amendment to GAC 50 permitted the contractholder to direct Hancock to use the "free funds" for the payment of so-called "Non-Guaranteed Benefits" (JA-240 to JA-249). Such benefits were fixed in amount, and no plan participant was entitled to receive a benefit payment the amount of which varied based upon Hancock's General Account experience (JA-97, JA-242 to JA-243). The availability and use of this mechanism (which was terminated

(Footnote continued)

The Second Circuit's flawed interpretation of the "to the extent that" and "provides for" phrases caused it to treat the contract as if it could be divided into "guaranteed" and "non-guaranteed" portions. No such separate portions can, or do, exist. Because General Account contracts like GAC 50 do not have any segregated or identifiable assets associated with them, there are no specific assets that could be assigned to separate portions of the contract. Furthermore, because the contract's book value in its entirety can be used by the contractholder at any time to require the payment of additional guaranteed benefits, Hancock's contract obligations are not divisible.[45]

Finally, the Second Circuit's construction, if carried to its logical extreme, would lead to an absurd result. The court's decision would cause all of an insurer's General Account assets to be subjected to "plan assets" treatment by reason of even a single group annuity contract issued to an ERISA pension plan. Every participating General Account contract shares in the investment experience of the General Account and is likely at all times

in 1982 (JA-98; PA-17 to PA-18)) did not affect GAC 50's status as a guaranteed benefit policy, because Hancock was at all times obligated to the full extent of the book value of the contract to provide guaranteed benefits if directed to do so by Harris Trust.

[45] Having wrongly assumed that the contract could be divided into portions, the Second Circuit next assumed, erroneously, that the so-called "guaranteed" portion of the contract is insulated from positive or negative investment experience, while the "non-guaranteed" portion is affected by such experience (PA-8 to PA-9). The entire book value of the contract, however, not just the "free funds," varies in amount on the basis of the General Account's investment performance (JA-91). Indeed, the book value of the contract may increase as a result of positive investment experience while the amount of the "free funds" simultaneously declines. Positive investment experience will produce an increase in the amount of "free funds" under the contract only if other factors affecting the amount of "free funds" are assumed to be constant. For example, if Hancock is directed by the contractholder to provide additional guaranteed benefits under the contract, the "free funds" are immediately reduced by the "cost" of the benefits determined in accordance with the contract's annuity purchase rates. The book value of the contract, however, is unaffected.

to have "free funds" in some amount associated with it. Applying the Second Circuit's reading of the statute, an insurer would become a fiduciary with respect to at least a portion of each and every contract issued to an ERISA plan. The effect of the Second Circuit's decision, therefore, would be to subject all of an insurer's undifferentiated General Account assets to ERISA's fiduciary rules, requiring the insurer to manage its entire General Account for the exclusive benefit, simultaneously, of each pension plan contractholder, and to the exclusion of the interests of all its other customers. Plainly, the statute does not contemplate any such result.

B. *The Second Circuit Decision Conflicts With State Law, the McCarran-Ferguson Act and ERISA's Preemption Saving Clause.*

The Second Circuit decision creates an irreconcilable conflict between federal and state law. Under that decision, ERISA's fiduciary standards govern insurers' General Account activities — activities that are also subject to inconsistent state law standards and regulations. The Second Circuit has construed ERISA, therefore, in a manner that invalidates, impairs and supersedes state regulation of the business of insurance, in violation of the McCarran-Ferguson Act. Nothing in ERISA, however, evinces any intent by Congress to displace state regulation of insurance or to disrupt long-standing insurance company practices by subjecting an insurer's General Account assets to federal fiduciary requirements. Indeed, ERISA's preemption saving clause, ERISA § 514(b), 29 U.S.C. § 1144(b) (1988 & Supp. 1991), expressly reserves the regulation of the business of insurance to the States.[46]

[46] Section 514(b) provides, in relevant part:

> (b) Construction and application
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> * * *
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> (2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

1. *Congress Has Reserved to the States the Regulation of Insurance Company General Accounts.*

The McCarran-Ferguson Act embodies the basic federal policy that the States are exclusively responsible for regulating the "business of insurance." *See* 15 U.S.C. § 1011 *et seq.* (1988 & Supp. 1991). The McCarran-Ferguson Act provides, in pertinent part:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation . . . of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . .

15 U.S.C. §§ 1012(a), (b) (1988) (PA-93).

The McCarran-Ferguson Act was enacted to nullify the holding in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). As this Court has explained, the *South-Eastern Underwriters* decision upset the theretofore accepted understanding that "regulation of insurance transactions . . . rest[ed] exclusively with the States," *SEC v. National Secur., Inc.*, 393 U.S. 453, 458 (1969), and it "threatened the continued supremacy of the States in this area," *id.* at 459. The McCarran-Ferguson Act was intended "to turn back the clock" to establish that the States would once again have "a free hand in regulating the dealings between insurers and their policyholders." *Id.* at 459. *Accord State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 452 (1962) (McCarran-Ferguson Act provided that "regulation and taxation of insurance should be left to the States"); *see Royal Drug*, 440 U.S. at 218 n.18 ("no question that *primary* purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies . . ." [emphasis in original]).

Although ERISA's preemption provision, ERISA § 514(a), 29 U.S.C. § 1144(a) (1988), is broad, the statute "saves" from preemption under section 514(b) any state law "which regulates insurance, banking or securities." Following the enactment of ERISA, this Court addressed the question of ERISA's effect, if any, on the McCarran-Ferguson Act, especially in light of the statute's preemption provision. In the leading case of *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court settled that question. The Court held that ERISA's preemption saving clause reaffirmed the McCarran-Ferguson Act's reservation of the business of insurance to the States. *Id.* at 742-47. As the Court explained:

> The ERISA saving clause, with its similarly worded protection of "any law of any State which regulates insurance," appears to have been designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States. The saving clause and the McCarran-Ferguson Act serve the same federal policy and utilize similar language to define what is left to the States.

Id. at 744 n.21.[47] *Accord FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990).

2. *The Second Circuit Decision Construes ERISA in a Manner That Would Invalidate, Impair and Supersede State Regulation of the Business of Insurance.*

The Second Circuit decision would force insurers to act as ERISA fiduciaries in connection with the administration and

[47] The Court also relied upon section 514(d), 29 U.S.C. § 1144(d) (1988), in which Congress explicitly provided that ERISA, although designed to preempt certain state laws, was not intended impliedly to amend or impair other federal laws. *See* 471 U.S. at 744 n. 21. That section declares that "[n]othing in [ERISA] shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States" (PA-95). *See Northern Group Services, Inc. v. Auto Owners Ins. Co.*, 833 F.2d 85, 91-92 (6th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); Brummond, *supra*, at 120.

management of some portion of the assets in their General Accounts.[48] Those activities undoubtedly fall within the definition of the "business of insurance."[49] *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982); *Royal Drug*, 440 U.S. at 210-11; *National Securities, Inc.*, 393 U.S. at 458. As this Court has held, regulation that affects the insurer/policyholder relationship is at the core of the business of insurance. *E.g.*, *Metropolitan Life*, 471 U.S. at 743-44; *National Securities, Inc.*, 393 U.S. at 458.

The Second Circuit decision construes ERISA to impair state regulation of the business of insurance in several ways. Most fundamentally, the decision would impose ERISA's "solely in the interest of" standard on an insurer's relationship with its policyholder, thereby altering a contract arrangement sanctioned by the state, and would invalidate the state law requirements that General Account assets be administered to spread risk fairly and equitably among all General Account policyholders.[50] Moreover, the Second Circuit decision would displace the States' regulation of insurance by imposing federal fiduciary duties on

[48] The relationship between an insurer and insured is contractual in nature, and, at common law, an insurance company is not a fiduciary to its policyholders. *See, e.g.*, *Benefit Trust Life Ins. Co. v. Union Nat'l Bank of Pitt.*, 776 F.2d 1174, 1177 (3d Cir. 1985); *Rochester Radiology Assocs. v. Aetna Life Ins. Co.*, 616 F. Supp. 985, 988 (W.D.N.Y. 1985); *Uhlman v. New York Life Ins. Co.*, 17 N.E. 363, 366 (N.Y. 1888).

[49] In its motion for summary judgment in *Harris I*, Hancock identified various state laws that governed the Hancock business practices alleged by Harris Trust to violate ERISA. In its opinion (PA-31 n.10), the district court noted that "[a]s Hancock shows, and as Harris Trust apparently concedes, the practices of which Harris Trust complains are clearly part of the 'business of insurance' " (PA-32).

[50] *E.g.*, N.Y. Ins. Law §§ 2403, 2606-08, 4239 (McKinney 1985); Conn. Gen. Stat. Ann. §§ 38-446 to -447, -488, 38a-815 to -816 (West 1992 & Supp. 1993); Mass. Gen. Laws Ann. ch. 176D, §§ 2-3, 3(7) & ch. 175, § 120 (West 1993); N.J. Stat. Ann. §§ 17:29B-3 to -4, 17B:30-2 to -4 (West 1985). *See* NYS Brief at 5-11.

General Account activities that have long been subject exclusively to state laws and regulations.[51] As the State of New York has noted, the changes required by the Second Circuit's decision

> will interfere with the nondiscriminatory treatment of policyholders and contractholders required by State law; . . . will interfere with the State's ability to ensure the financial stability of insurance companies operating in the State; and . . . will severely impair the administration of the insurance laws by insurance regulators.

NYS Brief at 3.

Because it imposes ERISA fiduciary requirements on an insurer's administration and management of its General Account assets, the Second Circuit's construction of ERISA impairs and supersedes state regulation of the business of insurance in violation of the McCarran-Ferguson Act. Furthermore, by its construction, the Second Circuit also creates an internal inconsistency within ERISA itself. ERISA's preemption saving clause, as this Court held in *Metropolitan Life*, preserves the States' regulation of insurance. 471 U.S. at 742-47. The Second Circuit's interpretation of the "guaranteed benefit policy" provision, however, displaces that regulation.

3. *Congress Nowhere Expressed an Intent to Displace State Regulation or to Subject an Insurer's General Account Assets to Federal Fiduciary Duties.*

This Court has frequently said that, when Acts of Congress are alleged to change an industry's long-standing practices, it is expected that Congress will have mentioned and discussed the contemplated change. *See Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992) (not plausible to attribute to Congress an intention to upset established practices without a mention of that intention somewhere in the statute or in the congressional annals); *Mead Corp. v. Tilley*, 490 U.S. 714, 724 (1989) (Conference Committee would have discussed fully areas where ERISA altered

[51] *See* NYS Brief at 11-12.

prior law); *United Savings Ass'n v. Timbers of Inwood Forest Associates Ltd.*, 484 U.S. 380 (1988) (major change in existing rules not likely to have been made without specific provision in the text of the statute); *Watt v. Alaska*, 451 U.S. 259, 271 n.13 (1981) ("it is almost inconceivable that Congress knowingly would have changed substantially a longstanding formula for distribution of substantial funds without a word of comment").

In keeping with that established rule of statutory interpretation, this Court has been unwilling to construe a federal statute to undermine the federal policy that insurance regulation will be left to the States. As the Court explained in *Variable Annuity Life Ins. Co.*:

> We start with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of "insurance," they speak with the authority of a long tradition. For the regulation of "insurance," though within the ambit of federal power . . ., has traditionally been under the control of the States.

359 U.S. at 68-69. Accordingly, a federal statute will not be construed to deviate from that policy in the absence of language compelling that result. *Holliday*, 498 U.S. at 62 (presumption that Congress does not intend to preempt areas of traditional state regulation); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Prudential Life Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946).

Despite the sea change that ERISA's application to insurance company General Accounts would cause to fundamental insurance industry practices, neither the statute nor its legislative history reflects in any way an intent to affect those practices. Congress was unquestionably familiar with insurance industry products and operations and the States' extensive regulation in

those areas. Notwithstanding the fact that more than 1,300 persons, including 54 members of Congress, 46 insurance industry representatives and three State insurance regulators, provided oral or written statements during 93 days of hearings over the course of nine years (A-5 to A-9; A-19 to A-64), there is nothing in the legislative record to suggest that Congress was contemplating any legislative change to the insurance industry's General Account practices or to the States' regulation of those practices. Furthermore, not one of the 13 committee reports issued (A-1 to A-2), not one of the 20 bills and 24 amendments considered (A-9 to A-12), and none of the remarks made on the floor of Congress (A-15 to A-18) reflect any design by Congress to do so.

This overwhelming legislative record confirms the conclusion that ERISA's fiduciary responsibility provisions do not apply to insurers' administration and management of their General Accounts. As this Court said in *Massachusetts v. Morash*, the Court will not disturb the federal policy allocating responsibility for insurance regulation to the States, in the absence of any indication that the statute was designed to do so:

> The States have traditionally regulated the payment of wages, including vacation pay. Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with "the separate spheres of governmental authority preserved in our federalist system."

490 U.S. at 119 (quotation omitted). Because the statute and its legislative history contain no evidence of a congressional intent to change that policy, this Court should construe ERISA to avoid the unheralded reallocation of federal and state responsibilities that the Second Circuit's decision will produce.

C. *The DOL Has Consistently Adhered to the View That Insurance Company General Account Assets Are Not Plan Assets.*

Since ERISA's enactment, the DOL, in its pronouncements and enforcement practices, has consistently adhered to the view

that ERISA's fiduciary obligation provisions do not apply to an insurance company's assets under General Account contracts like GAC 50. Indeed, not once since 1974 has the DOL commenced any enforcement proceeding invoking the ERISA fiduciary rules as applicable to insurance company General Account practices. Because the DOL's interpretation is a valid construction of the statute, rendered by the agency charged by Congress with ERISA's implementation and enforcement,[52] that interpretation is entitled to great deference.

Shortly after ERISA was enacted, the DOL interpreted the statute as not applying to General Account assets. In its ERISA Interpretive Bulletin 75-2 (February 6, 1975) ("IB 75-2"), the DOL stated:

> If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets.

40 Fed. Reg. 31,598 (1975) (A-100), *codified as revised*, 29 C.F.R. 2509.75-2(b) (1991) (PA-97). Immediately after the publication of IB 75-2, the DOL issued its Advisory Opinion 75-79, which referenced the statute's fiduciary responsibility provisions (A-103). The DOL reaffirmed there that, in the case of General Account group annuity contracts, the insurance company's General Account assets are not "plan assets":

> Our latest interpretative bulletin, ERISA IB 75-2, a copy of which is enclosed herewith, makes clear that when a plan purchases a policy or policies on an insurance company's general assets account, the plan assets consist of the policy, and not the underlying assets of the insurance company.

The rationale for IB 75-2 was later explained to Congress in detail by the Assistant Secretary of Labor for Labor Management Relations in a 1975 oversight hearing:

[52] *See* ERISA § 505, 29 U.S.C. § 1135 (1988).

> So we exercised our authority to interpret the law and we published an interpretive bulletin . . . stating that the mere investment of plan assets by a plan in a corporate entity or partnership does not convert the assets of the corporation or partnership into plan assets and does not make the managers of the corporation or partnership fiduciaries to the plan. Those managers are thus not restricted from engaging in normal business transactions, including transactions with persons who happen to be parties in interest with respect to the policyholder plans.

Oversight on ERISA: Hearings on Pub. Law No. 93-406 Before the Subcommittee on Labor Standards of the House Comm. on Educ. and Labor, 94th Cong., 1st Sess., 391 (1975).

More recently, on November 13, 1986, the DOL published a final regulation dealing with the definition of "plan assets" in which it reaffirmed its view.[53] The DOL there stated the basic

[53] The Department of Labor had reaffirmed the continuing validity of IB 75-2 on numerous previous occasions. For example, in the Proposed Regulation Relating to the Definition of Plan Assets, the Department stated:

> Normally, when an employee benefit plan invests in another entity, it has exchanged an asset (usually cash) for another asset (usually a security issued by the entity) that gives the plan certain rights with respect to the underlying assets of the entity. With respect to most investments, the assets that a plan is considered to have acquired by reason of an investment are determined by reference to the terms of the instrument and applicable non-ERISA law. This general principle was first recognized by the Department in Interpretive Bulletin 75-2, which states that, generally, investment by a plan in securities of a corporation of [sic] partnership will not, solely by reason of such investment, be considered to be an investment in the underlying assets of such corporation or partnership so as to make such assets of the entity "plan assets."

50 Fed. Reg. 961 (1985). *See also* Proposed Regulations Relating to Definition of Plan Assets and to Establishment of Trusts, 44 Fed. Reg. 50,363, 50,364 n.4 (1979) (to be codified at 29 C.F.R. pt. 2550) (proposed Aug. 28, 1979) (section 401(b)(2) "mean[s] generally that assets held in an insurer's general

(Footnote continued)

general principle that "when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity." 29 C.F.R. § 2510.3-101(a)(2) (1991) (PA-99). The DOL further stated that the plan asset regulation was intended to make no substantive change in the portion of IB 75-2 dealing with insurance contracts and that, in that respect, the interpretive bulletin would have continuing applicability (PA-111).[54]

Ignoring the DOL's repeated statements and consistent interpretation and enforcement policy, the Second Circuit concluded that there was "confusion" in the DOL's published releases. In reaching that conclusion, the court misconstrued and misapplied two DOL Advisory Opinions, Advisory Opinions 83-51A and 78-8A, that, it said, were "seemingly contradictory" to IB 75-2 (PA-11 to PA-12).[55] In fact, those opinions relate to

account to support benefits under a contract purchased by a plan are not plan assets . . ."); Prohibited Transaction Exemption 81-82, 46 Fed. Reg. 46,443, 46,444 (1981); Prohibited Transaction Exemption 79-41, 44 Fed. Reg. 46,365, 46,368 (1979).

[54] Inasmuch as the principles underlying the plan asset regulation and IB 75-2 are the same, an analysis of GAC 50 under the regulation also leads to the conclusion that Hancock's General Account assets are not plan assets. The regulation provides that, if an investment is treated as indebtedness under state law without substantial equity features, the debt instrument is a plan asset, but the creditor's underlying assets are not. 29 C.F.R. §§ 2510.3-101(a)(2), (b)(1) (1991) (PA-99 to PA-100). The regulation further provides, with respect to a plan's investment in an equity interest of an entity, that the entity's underlying assets are not plan assets if the entity is an operating company, *i.e.*, an entity primarily engaged in the production or sale of a product or service other than the investment of capital. 29 C.F.R. § 2510.3-101(c) (1991) (PA-99 to PA-102). Under either test, General Account assets under a contract like GAC 50 are not plan assets.

[55] The court of appeals compounded its error by interpreting IB 75-2 as dealing solely with prohibited transactions (PA-12 to PA-13). First, there is no support in the regulatory history or the wording of the statute for such a distinction. Second, the DOL's references to IB 75-2 in the contemporaneously issued Advisory Opinion 75-79 and in subsequent pronouncements (*see supra* notes 53-54) demonstrate that its interpretation was intended to have broad applicability beyond the prohibited transaction context. *See Mack Boring*, 930 F.2d at 276.

Separate Account, not General Account, contracts.[56] *Mack Boring*, 930 F.2d at 276 n.18.

IB 75-2 and the DOL's subsequent pronouncements are entitled to great deference under the standard set forth by this Court in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore*, the Court stated that it will give an administrative pronouncement weight depending upon "the thoroughness evidenced in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140.

Under *Skidmore*, the DOL's long-standing construction of the statute is entitled to great weight First, its interpretation was based upon thorough and valid reasoning as articulated in IB 75-2 and later pronouncements and is a "reasonable" construction of the statute. *E.E.O.C. v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1236 (1991) (Scalia, J., concurring); *see Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984). Second, the DOL rendered its interpretation virtually contemporaneously with the enactment of ERISA. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976). Third, IB 75-2 has been consistently applied and reaffirmed by the DOL since its issuance. Because the DOL's construction of the statute as it relates to General Account assets comports with the language of section 401(b)(2), and because any other construction flies in the face of both the statute as a whole and its legislative history, this Court should adopt the DOL's authoritative interpretation.

[56] *See supra* note 35.

Conclusion

The judgment of the court of appeals, insofar as it reversed the judgment of the district court dismissing the action, should be reversed.

May 20, 1993

Respectfully submitted,

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